Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Grande Communications Petition for	)	**WC Docket No. 05-283**
Declaratory Ruling Regarding	)	
Intercarrier Compensation for	)	
IP-Originated Calls	)	

COMMENTS OF GLOBAL CROSSING TELECOMMUNICATIONS, INC.

Michael J. Shortley, III
1080 Pittsford-Victor Road
Pittsford, New York 14534
585.255.1429

Attorney for Global Crossing
Telecommunications, Inc.

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Summary

The Commission should grant in part and deny in part the Grande petition.

A. Global Crossing agrees with Grande that traffic that originates from the calling party's premises in IP format and that terminates onto the PSTN is not subject to access charges. Existing Commission precedent can point to no other conclusion.

B. Global Crossing further agrees that the ILECs are not the police force of the telecommunications industry. Therefore, the Commission should declare that a terminating LEC must accept a certification from one of its customers, in the first instance, as to the nature of the traffic being delivered to it for routing and inter-carrier compensation purposes.

C. The Commission should deny the remainder of the Grande petition. In this regard, the Commission needs to distinguish the two different types of certifications that Grande discusses. The first is the certification that *Grande intends to provide* to the LEC to which it will deliver traffic for termination onto the PSTN. The Commission should require the terminating LEC to accept this certification in the first instance, but must also leave such LEC free to challenge its validity in a section 208 complaint proceeding or litigation.

The second type of certification is that which Grande proposes to receive from *its customers.* This type of arrangement is between Grande and its customers. If Grande believes that this approach constitutes appropriate due diligence, it is certainly free to request such representations from its customers. However, this certification should have no binding effect or even evidentiary weight in determining whether access charges are due on any particular traffic. The type of compensation due to a terminating LEC is

based solely upon the nature of the traffic being delivered, *viz.,* whether or not it has undergone a net protocol conversion. A service provider's state of mind, however, is not relevant to this determination.

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COMMENTS OF GLOBAL CROSSING TELECOMMUNICATIONS, INC.

Introduction

Global Crossing Telecommunications, Inc. ("Global Crossing"), pursuant to the Commission's Public Notice,[1] submits these comments on Grande Communications' petition for declaratory ruling.[2] In its petition, Grande seeks a declaration from the Commission that: (a) a local exchange carrier ("LEC") may rely upon a certification from its customer that traffic being sent to it originates in internet protocol ("IP") format from the calling party's premises; (b) a LEC may certify such traffic to a terminating LEC to which it proposes to send such traffic for termination onto the public switched telephone network ("PSTN"); and (c) terminating LECs that receive traffic that has been so certified must conclusively treat such traffic as local for routing and inter-carrier compensation purposes.[3]

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1 Public Notice, DA 05-260, *Pleading Cycle Established for Grande Communications' Petition for Declaratory Ruling Regarding Intercarrier Compensation for IP-Originated Calls*, WC Dkt. 05-283 (Oct. 12, 2005).

2 Petition for Declaratory Ruling Regarding Self-Certification of IP-Originated VOIP Traffic (Oct 3, 2005) ("Petition").

3 Petition at i, 9.

Grande observes that certain incumbent local exchange carriers ("ILECs") are attempting to assess access charges on IP-to-PSTN traffic and are threatening to block such traffic unless and until the access charges that they are demanding are paid.[4]

The Commission should grant in part and deny in part the Grande petition.

A. Global Crossing agrees with Grande that traffic that originates from the calling party's premises in IP format and that terminates onto the PSTN is not subject to access charges. Existing Commission precedent can point to no other conclusion.

B. Global Crossing further agrees that the ILECs are not the police force of the telecommunications industry. Therefore, the Commission should declare that a terminating LEC must accept a certification from one of its customers, in the first instance, as to the nature of the traffic being delivered to it for routing and inter-carrier compensation purposes.

C. The Commission should deny the remainder of the Grande petition. In this regard, the Commission needs to distinguish the two different types of certifications that Grande discusses. The first is the certification that *Grande intends to provide* to the LEC to which it will deliver traffic for termination onto the PSTN. The Commission should require the terminating LEC to accept this certification in the first instance, but must also leave such LEC free to challenge its validity in a section 208 complaint proceeding or litigation.

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4 *Id.* at ii, 8-9.

request such representations from its customers. However, this certification should have no binding effect or even evidentiary weight in determining whether access charges are due on any particular traffic. The type of compensation due to a terminating LEC is based solely upon the nature of the traffic being delivered, *viz.*, whether or not it has undergone a net protocol conversion. A service provider's state of mind is not relevant to this determination.

By granting this narrower relief, the Commission will: (a) ensure that ILECs do not improperly interfere with the ability of other providers to terminate traffic in any lawful manner, including through the use of local exchange facilities; and (b) base decisions on whether access charges are, in fact, due upon the actual, objective nature of the traffic rather than upon the state of mind of one or more parties.

Argument

I. TRAFFIC THAT ORIGINATES IP ON THE CALLING PARTY'S PREMISES IS NOT SUBJECT TO ACCESS CHARGES UNDER EXISTING LAW.

To date, the Commission has declined explicitly to conclude that traffic that originates from a calling party's premises in IP format, undergoes a *net* protocol conversion, and terminates onto the PSTN constitutes an "information" or "enhanced" service.[5]

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[5] *See, e.g., Federal-State Joint Board on Universal Service, Respect to Congress*, 13 FCC Rcd 11501 (1998) ("Stevens Report"); *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, Memorandum Opinion and Order, 19 FCC Rcd. 22404 (2004) ("*Vonage Order*").

The Commission's failure to date to resolve this issue has spawned numerous controversies and proceedings, ongoing disputes within the telecommunications industry and the development of services and strategies with no better objective in mind than to find creative ways to avoid inflated ILEC and CLEC access charges. The Commission should end -- or at least eliminate the recurrence of these controversies -- by acting promptly on intercarrier compensation reform.

Based upon existing law and precedent, the Commission could easily conclude that such traffic is enhanced traffic and may therefore be terminated over local exchange facilities without the imposition of access charges.[6] The Commission's existing rules define enhanced services as:

> services, offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different or restructured information; or involve subscriber interaction with stored information.[7]

In declaring that protocol conversion services were enhanced, the Commission relied upon the fact that the services involved, on an end-to-end basis, a *net* protocol conversion.[8] In contrast, the Commission concluded that asynchronous transfer mode and frame relay services were basic telecommunications services precisely because those services did *not* entail a net protocol conversion.[9]

More recently, the Commission has relied -- albeit mostly in the negative -- upon the basic/enhanced distinction codified in its rules to classify particular services. In the *AT&T IP Order*, for example, the Commission concluded that AT&T's phone-to-phone

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6 In its Petition, Grande carefully and correctly limits its request for relief so that it would only cover the period until the Commission establishes rules governing intercarrier compensation prospectively. Petition at 9.

7 47 C.F.R § 64.702(a).

8 *Communications Protocols Under Section 64.702 of Commissions Rules and Regulations,* Report and Order, 2 FCC Rcd. 3072, 3081-82 (1987).

One consequence of a service being classified as an enhanced service is that such a service is *not* subject to access charges, but rather may be originated or terminated through local exchange facilities. *MTS and WATS Market Structure*, 97 FCC2d 682, 715 (1983).

9 *Independent Data Communications Mfrs. Ass'n,* Memorandum Opinion and Order, 10 FCC Rcd. 13717 (1995).

IP telephony service was a telecommunications (i.e., basic) service,[10] in large part, precisely because it did not involve a net protocol conversion.[11] It also held that AT&T's prepaid calling card service did not, in essence, involve subscriber interaction with stored information, and, hence, was also a basic service.[12]

In contrast, in the *Vonage Order*, although the Commission declined affirmatively to conclude that Vonage's IP telephony services were enhanced,[13] it nonetheless preempted state regulation of such services. Even where the Commission has not affirmatively classified a service involving a net protocol conversion as an information service -- e.g., IP-enabled services -- the Commission has made clear that such services are *not* subject to access charges.[14]

In ruling upon the Grande petition, the Commission need not necessarily resolve the issue whether the services described by Grande are information services or

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10 In the Telecommunications Act of 1996, Congress codified the term "telecommunications service" and "information service." Those two terms are, for all practical purposes, synonymous with the terms "basic service" and "enhanced service" as used in the Commission's rules. *See Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934,* First Report and Order, 11 FCC Rcd. 21905, 21955-58 (1996).

11 *Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services Are Exempt from Access Charges,* 11 FCC Red 7457, 7461 (2004)

12 *Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services,* Order, 20 FCC Rcd. 4826, 4830-32 (2005).

13 *Vonage Order,* 19 FCC Rcd. at 22411 & n.46.

But see Communications Assistance for Law Enforcement Act and Broadband Access and Services, First Report and Order, 20 FCC Rcd. 14989 (2005) (concluding that IP-Enabled services were "telecommunications" within the meaning of CALEA); *IP-Enabled Services and 911 Requirements for IP-Enabled Service Providers,* First Report and Order, 20 FCC Rcd. 10245 (2005) (imposing E911 telecommunications-based requirements upon IP-Enabled service providers).

14 *IP-Enabled Services*, Notice of Proposed Rulemaking, 16 FCC Rcd. 9610, 9613 (2001) ("IP telephony [is] generally exempt from access charges").

telecommunications services. The Commission should, however, declare that, consistent with existing precedent, such services are *not* subject to access charges.[15]

II. THE COMMISSION SHOULD DECLARE THAT LECS MUST RESPECT CUSTOMER CERTIFICATIONS AS TO THE NATURE OF THEIR TRAFFIC IN THE FIRST INSTANCE FOR PURPOSES OF ROUTING AND INTERCARRIER COMPENSATION.

In its petition, Grande observes that certain termination providers -- principally ILECs -- are attempting to assess access charges on traffic that undergoes a net protocol conversion based solely upon calling party number ("CPN") information.[16] Grande has also observed that those ILECs are threatening to terminate service to Grande unless and until access charges are paid.[17]

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15 In this regard, it is important that the Commission focus upon the nature of the *services* being provided, rather than on the self-classification of a particular *service provider*. It is the *service* that determines whether access charges apply. The Commission has consistently made this determination on a service-by-service basis and not on the basis of how a service provider classifies itself. Moreover, it is commonplace for an individual service provide to offer both telecommunications and information services. *See, e.g., Southwestern Bell Tel. Co. v. FCC,* 19 F.3d 1475, 1481 (D.C. Cir. 1994); *Nat'l Ass'n of Reg. Utils. Comm'rs v. FCC,* 533 F.2d 601, 608 (D.C. Cir. 1976). As a result, it is routine for service providers to design different offerings and different termination strategies depending upon the regulatory significance of the various services that they offer.

16 Petition at 9.

This is not the only misuse that ILECs are making of CPN data. In a case referred to this Commission from the United States District Court for the Eastern District of Missouri, Global Crossing has alleged that SBC is improperly assessing intrastate access charges upon wireless traffic that is jurisdictionally interstate, based solely upon the CPN transmitted by the originating party. *See Global Crossing Telecommunications, Inc. v. Southwestern Bell Telephone, LP,* No. 4:04cv319, Order (E.D. Mo. June 14, 2004) ("*Reference Order*"). In response to the *Reference Order*, Global Crossing has requested declaratory relief from the Commission. *See Petitions for Declaratory Relief Concerning Terminating Switched Access for Wireless-Originated Calls*, WC Dkt. 04-424, Petition for Declaratory Ruling (Oct. 27, 2004). Global Crossing requests that the Commission act upon that petition prior to the deadline suggested by the Court of January 6, 2006. *See id.,* Order (E.D. Mo. July 21, 2005).

17 Petition at 9.

It appears from the petition (although it is not clear) that the ILECs are attempting to assess such charges on CLECs such as Grande. Completely independent of the merits of Grande's petition, this conduct is completely improper. If terminating access charges are due at all, they are due from the *terminating interexchange carrier* ("IXC"), not another

The Commission should declare such behavior unlawful. By engaging in these tactics, the ILECs are arrogating unto themselves the role of industry police, a role that neither they -- nor, for that matter, any other providers -- are suited to play. The Commission has long frowned upon such practices,[18] and it should do so in this context as well.

Grande's proposal -- that a certificate provided to the terminating LEC that the traffic being sent over local exchange facilities may lawfully be delivered in this manner because it originates in IP format from the calling party's premises -- is a reasonable approach. By tendering such certification, the provider is affirmatively acknowledging that it has done the necessary due diligence to make such a representation. Thus, to the extent that a customer of a terminating LEC provides a factual certification as to the nature of the traffic being delivered, the Commission should declare that the terminating LEC must accept must accept such certificate as *prima facie* evidence that the traffic being delivered to it may properly be terminated over local interconnection facilities and as to which local termination charges apply.

Indeed, this is more than terminating LECs are entitled to receive today. By completing an access service request or local service request, the LEC's customer is, in

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exchange carrier or, for that matter, any other entity. *See* WC Dkt. 05-276, Comments of Global Crossing Telecommunications, Inc., *passim* (Nov 10, 2005). Indeed, to the extent that LECs are seeking to extort access charges from entities that are not their customers for access services, that conduct itself violates sections 201(b), 202(a) and 203(c) of the Communications Act. *See, e.g., Ascom Comms., Inc. v. Sprint Comms. Co.*, Memorandum Opinion and Order, 15 FCC Rcd. 3223 (2000).

18 *E.g., MCI Telecomms., Inc.*, Memorandum Opinion and Order, 62 FCC 2d 703 (1976).

In its decisions, the Commission has used the term "self-help" and parties have frequently -- and inaccurately -- latched onto that term. That term is somewhat of a misnomer as either party in a dispute may be characterized as engaging in "self help." Global Crossing suggests that the Commission strike the term from its lexicon and simply view such decisions as ones relating to the assignment of the appropriate burden of proof.

fact, *already* certifying that it believes that it is routing such traffic appropriately. The proposed certification goes one step further and constitutes an affirmative acknowledgement as to the precise nature of the traffic being delivered for termination onto the PSTN.

In this manner, a CLEC may route traffic that is properly certified without being at the mercy of terminating LEC to disrupt its operations -- and its customers' traffic -- by refusing to provision orders or by improperly attempting to assess access charges on either the CLEC itself or the CLECs' customers. This proposed solution also appropriately reserves to the Commission the ultimate authority to resolve such disputes.

III. THE COMMISSION SHOULD DECLINE TO ACCORD CONCLUSIVE WEIGHT TO EITHER OF THE CERTIFICATIONS PROPOSED BY GRANDE.

For purposes of determining whether access charges are due on any particular traffic, the only relevant factor is the nature of the traffic being delivered to the terminating LEC. State of mind is not, under the existing access charge rules or access tariffs, a criterion of any decisional significance. The Commission should decline to introduce this factor into the calculus (indeed, in ruling on a petition for declaratory ruling, the Commission may not do so as it is limited to declaring what existing law is).

Despite this, Grande asks the Commission effectively to treat as conclusive certificates that Grande receives from *its* customers and the certificates that it proposes to provide to terminating LECs.[19] The Commission should deny these aspects of Grande's petition.

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[19] Petition at 9.

First, Grande (or any other provider) and its customers are free to allocate risk -- *as between themselves* -- in any manner that they freely negotiate. If Grande is concerned that its customers -- or customers of its customers -- are being less than forthright, it may protect itself by appropriate indemnification, audit and termination provisions. Neither it nor any other provider is entitled to a Commission *imprimatur* on its internal practices. If Grande or any other provider wishes to utilize a certificate process as a part of its business due diligence, there is nothing that prevents it from engaging in that due diligence exercise today. This certificate, however, should no effect whatever on third parties, who are complete strangers to any transaction between Grande and its customers. Thus, while Grande or any other provider may request such representations from its customers (and, indeed, they are common in the industry today), the Commission should neither approve nor disapprove of this approach.

Second, the certificate that Grande proposes to provide to a terminating LEC should not have any conclusive effect. For the reason set forth in Part II *supra,* the Commission should require a terminating LEC to accept a certificate from its customer for the *purposes of routing and rating such traffic in the first instance*. Such a certificate, however, should carry no more weight. A terminating LEC should to free -- through the Commission's section 208 complaint process or litigation -- to challenge the factual accuracy of any such certification and to collect access charges, if due, from the party that actually owes such access charges.[20]

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[20] The Commission should make clear that a LEC may seek to recover access charges *only* from the party from which access charges would be due, namely, the terminating IXC. If access charges are, in fact, due, nothing in the relief proposed by Grande or as modified by Global Crossing's suggestions herein or for any other reason should provide the LEC with any greater rights vis-à-vis third parties from whom they may collect access charges. By collecting access charges from the terminating IXC -- its customer for access services -- an affected LEC may be made whole. *See* WC Dkt. 05-276, Comments of Global

In such a proceeding, the LEC -- as the complainant or plaintiff -- would bear the burden of proof in demonstrating its entitlement to access charges on disputed traffic.[21] However, what the complainant should be required to prove is the objective circumstance that would entitle it to the payment of access charges, namely, that the traffic in question in fact underwent no net protocol conversion. A party's state of mind is simply not a relevant factor on this determination. The Commission should not (even if it could) rewrite its access charge unless to introduce state of mind as a criterion of any decisional significance.[22]

Conclusion

For the foregoing reasons, the Commission should act upon the petition in the manner suggested herein.

Respectfully submitted,

/s/ Michael J. Shortley, III
Michael J. Shortley, III

1080 Pittsford-Victor Road
Pittsford, New York 14534
585.255.1429

Attorney for Global Crossing
Telecommunications, Inc.

December 12, 2005

Crossing at 13 & n.18. There is no need of any further protection and neither the Commission's existing access charge rules nor existing access tariffs provide any further protection. The terminating LEC would also possess whatever rights it has against another LEC that breached the term of an interconnection agreement by delivering interexchange telecommunications traffic over local interconnection facilities.

21 *E.g., Directel, Inc. v. Am. Tel. & Tel. Co.*, Memorandum Opinion and Order, 11 FCC Rcd. 7554, 7560-61 (1996).

22 Certainly, state of mind would be distinctly relevant in an *enforcement* proceeding. However, state of mind has nothing to do with whether access charges are due on particular traffic.

Certificate of Service

I hereby certify that, on this 12th day of December, 2005, a copy of the foregoing Comments of Global Crossing Telecommunications, Inc. was served by first-class mail, postage prepaid, upon:

Brad E. Mutschlesknaus
Kelley Drye & Warren
1200 19th Street, N.W., 5th Floor
Washington, D.C. 20036

/s/Michael J. Shortley, III
Michael J. Shortley, III